No. 80-1785

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In the Supreme Court of the United States

OCTOBER TERM, 1980

A & B FREIGHT LINES, INC., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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1. Under Sections 5(a)(2) and 6(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(2) and 46(a), "common carriers subject to the Acts to regulate commerce" are exempted from the regulatory and investigative jurisdiction of the Federal Trade Commission. Petitioners, A & B Freight Lines, Inc., *et al.* ("A&B"), are parties to an inquiry before the Interstate Commerce Commission (*Ex parte No. 297 (Sub No. 4)*) considering, *inter alia,* whether the ICC should withdraw the antitrust immunity from agreements entered into by various common carriers (Pet. App. 8a). At the invitation of the ICC (43 Fed. Reg. 1667 (1978)), the FTC intervened in that proceeding. The FTC also has compiled certain information and hired consultants to study the motor common carrier industry (Pet. App. 2a).

A&B sued the FTC in the United States District Court for the District of Columbia to enjoin it from conducting studies of the motor common carrier industry and from continuing its participation in the ICC proceeding. On January 6, 1980, the district court granted the FTC's motion to dismiss. Relying on *Leedom* v. *Kyne*, 358 U.S. 184 (1958), the district court held that A&B had failed to establish that the FTC has either (1) plainly exceeded its statutory authority, or (2) caused A&B irreparable injury, or any other injury serious enough to warrant extraordinary injunctive relief (Pet. App. 1a-9a). The district court later denied A&B's motion for rehearing based on the purported discovery of new evidence—*i.e.*, the FTC's use of consultant reports in the ICC proceeding (Pet. App. 11a). The court of appeals affirmed summarily on the ground that A&B had "not shown irreparable injury" (Pet. App. 12a).

2. In this Court, A&B concedes that it did not show irreparable injury (Pet. 7, 13), but nevertheless argues that such a showing is unnecessary as a predicate for injunctive relief (Pet. 8-13). Thus, the only issue raised by A&B's petition is whether a district court may dismiss a complaint for injunctive relief in a case in which the plaintiffs have failed to allege facts sufficient to show irreparable injury. The court of appeals' resolution of this issue is correct and conflicts with no decision of this Court or any other court of appeals. It reflects a proper application of traditional principles of equity jurisprudence. Further review by this Court is therefore unwarranted.

The district court correctly relied on *Leedom* v. *Kyne*, *supra*, in holding (Pet. App. 2a) that A&B must show irreparable injury in an action that does not challenge "the substance of an agency rule, order or policy," but rather seeks to enjoin an agency from hiring consultants and from participating in a proceeding before a sister agency whose

final order will be subject to judicial review. A&B's assertion (Pet. 8) that this Court did not require a showing of irreparable injury in *Leedom* is plainly inconsistent with the Court's statement that, without equitable relief, the plaintiffs in that case would suffer the " 'sacrifice or obliteration of a right' * * *, for [which] there is no other means, within their control * * * to protect and enforce * * *." 358 U.S. at 190.

To the extent A&B challenges the FTC's conduct in hiring consultants to study the motor common carrier industry, any injury to A&B arising from such activity is far too remote and speculative to constitute irreparable injury entitling A&B to immediate intervention in the agency's affairs.[1] See, *e.g., FTC* v. *Standard Oil Co. of California,* No. 79-900 (Dec. 15, 1980), slip op. 6-11; *Renegotiation Board* v. *Bannercraft Clothing Co.,* 415 U.S. 1, 24 (1974); *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U.S. 41, 50 (1938). To the extent the FTC's participation in an ICC proceeding adversely affects or aggrieves A&B, A&B has an adequate remedy at law upon judicial review of any final ICC ruling. See, *e.g., FTC* v. *Standard Oil Co. of California, supra,* slip op. 13-14; *Whitney National Bank* v. *Bank of New Orleans,* 379 U.S. 411, 420-421 (1965).[2] In this

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[1]The Commission can only do three things with its studies: (1) it can lay them aside and not use them, in which case A&B would suffer no adverse consequences; (2) it can use them to initiate, or participate in, a law enforcement proceeding, in which case A&B would be entitled to defend itself on jurisdictional and substantive grounds; or (3) it could, in the public interest, make its studies public or submit them to Congress with "recommendations for additional legislation" pursuant to Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and as amended by Pub. L. No. 96-252, 94 Stat. 374-375. In the last instance, the Commission would merely be fulfilling a statutorily authorized function that could not give rise to legally cognizable injury.

[2]A&B concedes (Pet. 13) that "[i]rreparable injury is that imminent harm which cannot be remedied by way of an action at law. *Rondeau* v. *Mosinee Paper Corp.,* 422 U.S. 49 (1975)."

regard, the district court pointed out that the alleged injuries arising from the FTC's participation in the ICC's proceeding relate primarily to the burden, risk, and inconvenience to A&B of both defending itself in the ICC proceeding (or other unspecified proceedings) and rebutting the FTC's arguments (Pet. App. 7a-8a). The court correctly held that such burdens and inconveniences do not constitute irreparable injury. *FTC* v. *Standard Oil Co. of California, supra,* slip op. 11; *Renegotiation Board* v. *Bannercraft Clothing Co., supra,* 415 U.S. at 24; *Myers* v. *Bethlehem Shipbuilding Corp., supra,* 303 U.S. at 50.

To support its contention that it need not show irreparable injury, A&B relies (Pet. 7, 8) upon *Skinner & Eddy Corp.* v. *United States,* 249 U.S. 557 (1919). That case is not relevant here. *Skinner & Eddy* was an attempt to enjoin implementation of an ICC rate order. This Court's decision, when read in conjunction with the cases it relied upon, stands for the basic proposition that parties "affected by [an] order" of the ICC may obtain statutory judicial review of that order (*ICC* v. *Diffenbaugh,* 222 U.S. 42, 49 (1911)). Compare the Court's discussion in *Skinner & Eddy, supra,* 249 U.S. at 562-563. Thus, A&B's assertion that no showing of irreparable injury was required in *Skinner & Eddy* (Pet. 8) is beside the point because the plaintiff in that case was an interested party seeking to set aside a final adverse rate order (249 U.S. at 559-560). The complaint in this case is subject to a wholly different standard because it does not challenge a final agency order but merely seeks to prevent the FTC from hiring consultants and participating in a proceeding that may result in a judicially reviewable ICC order—if any order is issued at all. Compare *Leedom* v. *Kyne, supra; FTC* v. *Standard Oil Co. of California, supra.*[3]

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[3]A&B also contends (Pet. 9, 13) that it need not prove irreparable injury to survive a motion to dismiss but need only allege facts sufficient

3. The FTC has not violated any statutory provision by hiring consultants to study the motor common carrier industry or by participating in an ICC proceeding at the invitation of that agency. The FTC's action as an invited public interest participant, which seeks only to provide information and comments to the ICC, is neither an "investigation" within the meaning of the Commission's rules and Section 6(a) of the FTC Act, 15 U.S.C. 46(a) (compare 16 C.F.R. Part 2), nor an attempt to "regulate" within the meaning of its rules and Section 5(a) of the Act, 15 U.S.C. 45(a) (compare 16 C.F.R. Part 3). The FTC could "regulate" A&B only by means of an FTC adjudication or by engaging in substantive rulemaking. The FTC has done neither. Nor has it engaged in improper investigation. It has not served any subpoena or information demand on A&B. By responding to the ICC's invitation to participate, the FTC has merely exercised its "implied power [as] a government agency * * * to cooperate with other government agencies concerning intermesh of jurisdiction or other matters of mutual concern." *Municipal Intervenors Group* v. *FPC*, 473 F. 2d 84, 90 (D.C. Cir. 1972). See also *Shell Oil Co.* v. *Department of Energy*, 631 F. 2d 231 (3d Cir. 1980), cert. denied, No. 80-924 (Mar. 23, 1981).

The principal authority relied on by A&B (Pet. 10, 12) to challenge the FTC's actions (*FTC* v. *Miller*, 549 F. 2d 452 (7th Cir. 1977)) is not pertinent to the issue presented in this case. In *Miller*, the FTC sought to enforce a subpoena against a common carrier that was the target of an investigation to determine whether its non-carrier activities violated Section 5 of the FTC Act. This case does not involve

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to show such injury. However, in granting the motion to dismiss in this case, the district court assumed the truth of the complaint's allegations. It nonetheless held that the alleged injuries were not legally cognizable as irreparable injuries (Pet. App. 11a, 7a-8a).

any attempt by the Commission either to investigate possible violations of the FTC Act by A&B or to regulate A&B's activities. And it involves no attempt to enforce a subpoena against A&B. Accordingly, the district court correctly ruled that "neither the holding nor the analysis [in *Miller*] addresses the issue of statutory interpretation here at issue" (Pet. App. 5a n.4).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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